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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-105

GOLDEN EAGLE, ALSO KNOWN AS LEE ROY AUSTINE,
PETITIONER

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORN AND KIT NELSON,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner Golden Eagle, also know as Lee Roy Austine, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 15, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 493 F.2d 1179. The orders of the District Court for the Eastern District of California dated August 20, 1971 and March 16, 1972 are unreported. The opinion of the Court of Appeals and the orders of the District Court are appended to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 15, 1974. On June 7, 1974, Mr. Justice Douglas signed an order extending the time for filing this petition for certiorari to and including August 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is use and possession of peyote a protected religious sacrament?

2. Was petitioner entitled to pre-arrest safeguards by reason of the due process clause

of the Fourteenth Amendmant to the Constitution, where bona fide religious use of peyote must be established to secure an exception to the criminal sanctions otherwise applicable, requiring at a minimum a reasonable pre-arrest investigation, the necessity of a warrant, and a pre-arrest adversary hearing?

3. Was the seizure of petitioner's personal religious articles illegal, whether or not his arrest was valid?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 42:

> §1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviliges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

United States Code, Title 42:

> §1985. Conspiracy to interfere with civil rights (3) If two or more persons

in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support of advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived

of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators.

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner in this case is Golden Eagle, a Navajo Indian and a member of the Native American Church. Central to the practice of his church is the worship and ingestion of scaramental peyote. Petitioner was arrested for possession of peyote on the night of July 11, 1971, after the car in which he was riding had been stopped for a defective license plate light. He candidly told respondent California Highway Patrol officers that a symbolically inscribed wooden box belonging to him contained sacramental peyote along with other ritual paraphernalia. Petitioner further explained that the peyote was a sacrament taken during religious ceremonies of the Native American Church. His candid admission of possession was prompted by his belief that his possession of peyote

was protected by the United States Constitution.

Respondents Peters and Heerd, joined by respondents Deputy Sheriffs Hall and Johnson, then proceeded to search the car and seized the box of religious paraphernalia containing the peyote. At the time of his arrest and during the booking procedure at the Mojavi jail facility at Tehachapi, California, petitioner repeated his request to the arresting officers to check out his claim of bona fide religious use of peyote by calling his landlady or church leader. He was permitted to call his landlady who told jail officials that Golden Eagle's church membership could be verified by contacting a named church leader. Respondent officers and jail officials made no effort to investigate the claim of bona fide religious use of peyote. After 31 days in jail, Golden Eagle's bail was reduced and friends were able to secure his release. During his incarceration, Golden Eagle was repeatedly harassed and humiliated by his jailors and pressured to plead guilty to a lessor offense both by his public defender and the judge who presided at his arraignment and preliminary hearing. He continued to insist on his immunity and request that the charges be dropped or he

be given a jury trial. He was finally bound over for jury trial in the Superior Court of the State of California in and for the County of Kern. Criminal charges were dismissed in the interest of justice at the request of the District Attorney on the morning of trial.

This action was commenced on November 17, 1970. Much of the matter on the face of the complaint was rendered moot by the dismissal of criminal charges against Golden Eagle. Petitioner continues to assert that the acts and conduct of the arresting officers denied him the right freely to exercise his religion and deprived him of due process of law. He also asserts that the seizure of his personal articles not consisting of contraband, deprived him of the right to be free of such unlawful seizure under the Fourth, and Fourteenth Amendments to the Constitution.

The district Court dismissed these claims and the Court of Appeals for the Ninth Circuit affirmed. The opinion of the Court of Appeals is reported at 493 F.2d 1179 (9th Cir. 1974).

REASONS FOR GRANTING THE WRIT

I

WHETHER USE AND POSSESSION OF PEYOTE MAY BE PROTECTED UNDER THE FIRST AMENDMENT IS A SUB-

STANTIAL FEDERAL QUESTION NOT
YET DETERMINED BY THIS COURT

This court has held that a State may not abridge religious freedom without demonstrating that a compelling state interest in regulating the conduct in question outweighs the Constitutional protection of religious freedom. Sherbert v. Verner, 374 U.S. 398 (1963). In 1964, the California Supreme Court, applying Sherbert, supra, held that use of peyote for bona fide religious purposes was protected by the First Amendment, and that no compelling state interest justified regulation of that use. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964).

Necessairly the immunity for religious purposes granted by People v. Woody, supra, also extends to the possession and transportation of peyote. The peyote cactus which provides the sacrament taken at the services held on reservations must be collected or purchased and prepared and distributed before it can be used.[1]

1. See In Re Grady, 61 Cal. 2d 887, 39 Cal. Rptr. 912, 394 P.2d 728 (1964), where habeas corpus was granted to allow the defendant to assert his religious defense although the peyote was not being used in a religious ceremony at the time of his arrest.

II

WHETHER THE ARREST OF PERSONS EXERCISING FIRST AMENDMENT RIGHTS OF RELIGIOUS FREEDOM MUST BE PRECEEDED BY CERTAIN SENSITIVE PRE-ARREST SAFEGUARDS IS A SUBSTANTIAL FEDERAL QUESTION NOT YET DETERMINED BY THIS COURT.

An Indian in possession of peyote for religious purposes is placed by the State of California in a anomolous position. He has a right to use it, but he still may be arrested for its possession and be subject to a long period of detention, even though charges are eventually dropped. He may be arrested without a warrant and charged with felony possession of peyote, while on his way to a religious meeting. An officer, motivated perhaps by a belief that there should be no exception, religious or otherwise, to the drug laws, and by a contemptuous attitude toward Indian people, may subject such persons to humiliation and inconvenience of arrest with no consideration of the religious issue. Even a person who is eventually successful in maintaining his innocence will still have a felony arrest record which can prevent being considered for jobs.

Golden Eagle therefore maintains that there can be no compelling interest of the State in preventing the institution of certain

sensitive pre-arrest procedural safeguards in this very narrow and unique area to prevent the threat of arrest without a warrant from intimidating and deterring members of the Native American Chruch from practicing their religion.[2]

Sensitive pre-seizure procedures have been instituted in other First Amendment con-

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2. The test in Woody is similar to that applied in the case of consientious objection to war: whether the belief professed is sincerely held. See United States v. Seeger, 380 U.S. 163, 185 (1965). The Universal Military Training and Service Act, however, provided that the threshold question of the sincerity of a religious claim of exemption would be reviewed administratively by Draft Appeal Boards, Department of Justice hearing officers, and investigated by the Federal Bureau of Investigation. Thus, before the person practicing the religious belief in pacifism was to be subjected to a criminal arrest and prosecution for refusal to be inducted, he was entitled to numerous procedural safeguards to assist in determining the validity of his exemption. Similarly, petitioner contends herein that before his religious activity is the subject of arrest and prosecution, due process entitles him to some administrative examination of the validity of his claim of exemption from application of the law, in the form either of some reasonable minimum investigation of the facts in support of his claimed belief, or of the requirement of a warrant or pre-arrest adversary hearing.

texts without greatly inconveniencing law enforcement officials or invalidating prior convictions. Such procedures have been evolved by the courts to protect freedom of speech. It has been held by this court that a prior adversary hearing on the question of obscenity is constitutionally required to prevent a prior restraint on free expression before the seizure in a civil, in rem proceeding, concerning large amounts of books. A Quantity of Books v. Kansas, 378 U.S. 205 (1964), Marcus v. Search Warrant, 367 U.S. 717 (1961).[3]

The free exercise of religion involved herein is threatened and intimidated by arrests and seizures. An important cultural ritual of a substantial number of Native Americans is

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3. This Court has recently held that a prior adversary hearing is not an absolute First or Fourteenth Amendment right in all cases where allegdly obscene material is seized, if that material is seized pursuant to a warrant issued after a determination of probable cause by a neutral magistrate and if an expedited hearing on the question of obscenity is made available promptly after seizure. Heller v. New York, 413 U.S. 483, (1973). However, it is still the rule that a precipitous seizure by a police officer acting on his own judgment without a constitutionally sufficient warrant is unreasonable under Fourth Amendment standards. Roaden v. Kentucky, 413 U. S. 496, (1973)

chilled and curtailed. If practice of the religion is protected, a full and meaningful protection should be afforded. The right to practice the religion of the Native American Church should not be a right which each member may be forced to defend in Court. Some pre-arrest safeguards are necessary to avoid a chilling effect on this religious practice.[4]

III

PERSONAL RELIGIOUS ARTICLES WHICH ARE NOT CONTRABAND AND WHICH ARE NOT NECESSARY TO IDENTIFY AN ACCUSED MAY NOT BE SEIZED IN CONNECTION WITH AN ARREST.

The seizure of petitioner's personal religious articles was also illegal. These items (with the exception of the peyote) were not contraband and there was no probable cause for their seizure, whether or not petitioner's arrest was valid. Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967). There was no nexus between the religious box

4. A police officer need not allow someone he suspects is not a bona fide practicioner of a religious faith simply to walk away. If he does not have a warrant, issued after a judicial determination of probable cause, he may take the suspect into custody and impound the peyote until this determination can be made.

and its ritual contents other than the peyote and criminal behavior. Certainly these items were not needed to identify petitioner. Petitioner contends that the only possible purpose for seizing and retaining these highly personal and sacred implements was to hold up to ridicule an "Indian religion" and harass and humiliate petitioner and his race. He has stated a claim for relief under the Civil Rights Act. Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit should be reversed. The sacramental use of peyote by a bona fied member of the Native American Church, which is protected in California under People v. Woody, supra, necessarily requires and should include minimal pre-arrest safeguards. Without such safeguards the First Amendment protections are meaningless.

Dated: August 12, 1974

Respectfully submitted,

BRUCE R. GREENE
WILLIAM P. LAMB
RAYMOND CROSS
CALIFORNIA INDIAN
LEGAL SERVICES

By: _____
Bruce R. Greene

APPENDIX A

GOLDEN EAGLE, also known as Lee Roy Austine, Appellant,

v.

Deputy Sheriff JOHNSON et al., Appellees.

No. 72-1820

United States Court of Appeals, Ninth Circuit.

March 15, 1974.

Before TRASK and SNEED, Circuit Judges, and LINDBERG,* District Judge.

SNEED, Circuit Judge:

Golden Eagle, also known as Lee Roy Austine, brought this action, pursuant to 42 U.S.C. §§1981, 1983, 1985 and 1988 and 28 U.S.C. §2201 and §2202, seeking to have (1) certain laws of the State of California declared unconstitutional, (2) certain criminal proceedings in the California courts enjoined, (3) certain records destroyed, and

* Honorable William J. Lindberg, Senior District Judge, Western District of Washington, sitting by designation.

(4) a recovery of damages from the defendants, who were the officers who arrested Golden Eagle, his jailers, various judges, prosecuting attorneys, and the public defender.

The complaint set forth what was described therein as seven causes of action. The defendants moved to dismiss the entire complaint and this motion was granted except as to the seventh cause of action. In accordance with Rule 54(b), Federal Rules of Civil Procedure, the trial court determined that there was no just reason for delay in the entry of a final judgment with respect to these causes of action and entered a final judgment with respect to them. The issue before us is whether this dismissal of six of the seven causes of action was proper. We hold that it was.

For the purposes of this decision, we assume the truth of the facts as alleged in Golden Eagle's complaint. On the evening of July 11, 1970, Golden Eagle was returning from the Navajo Indian Reservation to his home in Los Altos, California in an automobile driven by Patrick Joseph Ryan. In his possession at that time were sacramental peyote, a wooden box containing other religious paraphernalia, and certain drugs sold to him on prescription which were used to treat his

epilepsy. Between 10 p.m. and midnight the automobile was stopped by Officers Peters and Heerd of the California Highway Patrol because it lacked a license plate light and because the officers observed "furtive movements" in the vehicle.

After being stopped, Ryan could not provide satisfactory identification and the officers determined that the vehicle belonged neither to Golden Eagle nor Ryan. A search of the vehicle was initiated, allegedly so that the vehicle could be stored. Golden Eagle was asked by an officer what was in the wooden box and he responded by explaining that he was a member of the Native American Church, that the box contained religious paraphernalia, and that he had a constitutional right to use sacramental peyote for religious purposes.

Golden Eagle was handcuffed and forced to kneel on the ground. The officers, assisted by Deputy Sheriffs Hall and Johnson who had reached the scene, then conducted a through search of the vehicle without the consent of either Golden Eagle or Ryan. During this search the prescription drugs, the sacramental peyote, and the wooden box containing religious paraphernalia were

seized by Hall and Johnson.

Following the search, Golden Eagle and Ryan were transported to the Mojave jail facility at Tehachapi, California. At that time, Golden Eagle again informed members of the Kern County Sheriff's Department that he was a member of the Native American Church and as such he had a right to have sacramental peyote in his possession. Golden Eagle was permitted to call his landlady, and she told jail officials that he was a member of the Native American Chruch, that his membership could be confirmed by asking a church official whose name she supplied, that he suffered from epilepsy, and that this could be verified by taking him to a hearby hospital. No effort was made by anyone to follow up on these suggestions. About 6:45 a.m. on July 12, 1970, Golden Eagle and Ryan were transferred to the Kern County jail in Bakersfield. Again Golden Eagle's landlady called and made suggestions regarding the manner in which Golden Eagle's membership in the Native American Church and his right to use sacramental peyote could be verified.

The complaint continued by alleging Golden Eagle's incarceration in the Kern County jail for thirty-one days and certain events which allegdly occurred during that

period. A recital of these allegations is not necessary here because counsel for Golden Eagle conceded in his brief and in oral argument that only with respect to the first and sixth causes of action was the motion to dismiss impromerly granted. Both of these causes are based on the allegations described above. It was acknowledged by counsel for the plaintiff that all criminal charges against the plaintiff had been dropped before trial and that this rendered moot all claims against the judges, prosecuting attorneys and public defender. This disposed of the second and third causes of action. The fourth and fifth causes of action were also recognized as moot except to the extent such causes were also embraced by the first and sixth causes. The seventh cause of action, which involves claims against certain jailers, is not involved in this appeal.

The first cause of action charges that Officers Peters and Heerd, Deputy Sheriffs Hall and Johnson, Deputy District Attorneys for Kern County Robinson, Rostain, and Vandernoor, and Assistant District Attorney for Kern County, Bradshaw arrested, booked, and charged Golden Eagle for violation of §11910 (superceded by §11377 of the 1972 California Uniform Controlled Substances Act) of the

California Health and Safety Code by possessing peyote, a drug restricted by §11540 (superceded by §11363 of the 1972 California Uniform Controlled Substances Act) of the California Health and Sagety Code,[1] in bad faith and for the purpose of denying him the right to freely exercise his religion.

The sixth cause of action asserts that Officers Peters and Heerd and Deputy Sheriffs Hall and Johnson deprived Golden Eagle of property without due process of law by seizing and retaining the prescription drugs, the sacramental peyote, and the wooden box and its religious contents.

Precision is given these general allegations by the briefs and oral argument of the counsel for Golden Eagle. In essence, it is Golden Eagle's contention that under the First and Fourteenth Amendments of the Constitution of the United States an arrest for the possesison, and the seizure, of peyote should be preceded by an adversary hearing before a judicial officer to determine whether such possession was for a bona fide

1. Under the California Uniform Controlled Substances Act peyote is a Schedule I substance, §11054, and possession of such a substance is made unlawful under §11350. Planting, cultivating, and harvesting of peyote is proscribed by §11363.

religious purpose. An alternative pre-arrest and pre-seizure procedure required by these Amendments, asserts Golden Eagle, might be a warrant issued by a judicial officer on the basis of an ex parte showing that there is probable cause to believe that the possession and use was not for bona fide religious purposes. At a minimum, Golden Eagle urges that the First and Fourteenth Amendments require an arresting officer to make an effort to check the good faith of the religious claims of one found in possession of peyote before placing him under arrest.

Golden Eagle argues that one of these procedures is necessary to reduce the "chilling effect" of the possibility of arrest on the free exercise of religion by a member of the Native American Church. He points to the Supreme Court's requirement, fashioned in A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed2d 809 (1964), that an adversary hearing precede seizure of allegedly obscene material as recognition that sensitive procedural tools must be devised to safeguard against the infringement of First Amendment rights. He then asserts that the State of California in People v. Woody, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813

(1964), has recognized that the use of peyote, in the bona fied pursuit of a religious faith, is entitled to First Amendment protection. It follows, he continues, that pre-arrest and pre-seizure sensitive procedural tools also must be designed to minimize interference by the state with the bona fide use of peyote in the exercise of the religious faith of those who accept the teachings of the Native American Church. At least one of the procedural devices, he suggests, is constitutionally required.

Golden Eagle does not contend that his arrest was in any way improper absent such a constitutional requirement. Nor does he, despite the allegation of bad faith in the first cause of action, assert in his briefs or oral argument that the officers and deputy sheriffs believed that his arrest and the seizure of the box and his personal religious articles was unconstitutional. He does, however, assert that in all events the seizure violated the Fourth and Fourteenth Amendments.

As we understand it, the adversary hearing which Golden Eagle would have imposed by the First and Fourteenth Amendments in the context of the facts of this case would have operated to require that the arresting

officers take him into "protective custody" and "impound" the articles here seized pending a prompt hearing before a judicial officer to determine whether a bona fide religious purpose exists. Should the determination favor the person asserting such purpose, his release and the lifting of the impoundment would follow with the consequence that no record or arrest would exist. A contrary determination would lead to arrest and seizure, but it would not, of course, foreclose another determination of the good faith of the religious purpose at later stages of the criminal process.

The warrant procedure, suggested by Golden Eagle as the "second best" protection, envisions an ex parte hearing in which the possibility of bona fide use for religious purposes might be shown to be remote in the course of establishing probable cause for arrest or search and seizure. Golden Eagle's least preferable form of protection, a check by the apprehending officers of the good faith of the asserted religious purposes prior to arrest and seizure, also contemplates limited "protective custody" and "impoundment."

We hold the dismissal of the first and sixth causes of action was proper. We start

with the proposition that neither the Supreme Court of the United States nor this Court has extended First Amendment protection to the religious use of peyote by the members of any church. See Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir., 1972). Despite the opportunity that this case provides to pass on this issue, we decline to do so. To reach the issues which this case presents we will assume, without deciding, that the interpretation of the First Amendment appearing in People v. Woody, supra, is proper. We do this recognizing that our unwillingness to give an authoritative interpretation of the First Amendment as it relates to the religious use of a controlled substance such as peyote deprives our holding in this case of the underlying doctrinal commitment necessary to infuse it with maximum authority. Nonetheless, our notions of judicial restraint outweigh this consideration.[2]

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2. Analytically it would be possible for us to avoid assuming the correctness of People v. Woody by framing the issue before us as calling for a decision whether the interpretation of the First and Fourteenth Amendment which that case reflects, it being one not presently accepted by the federal courts, necessarily imposes upon California a burden, derived from the Due Process Clauses of the Fifth [footnote continued on next page]

It follows from our assumption of the correctness of People v. Woody, supra, that we adopt for the purposes of this case the weights assigned to competing values by the California Supreme Court. Thus, the degree of danger to the state arising from the religious use of peyote is assumed by us to be outweighed by freedom of religion as protected by the First Amendment. We also accept, arguendo, the California Supreme Court's determinations that the religious use of peyote does not lead to the use of more harmful drugs, that peyote is not used by Indians in place of proper medical care, that its religious use does not corrupt children nor obstruct enlightenment, and that immunity from prosecution for the religious use of peyote will not render impossible the effective enforcement of the narcotics laws of California. Finally, we will assume, but not decide, that People v. Woody, supra, affords protection to those

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Amendment and the Fourteenth Amendment, to provide at least one of the procedural safeguards urged by the Plaintiff. To so frame the issue, however, would require the examination of perhaps an ever more intriguing constitutional issue than that posed to us by Golden Eagle. Because we are very doubtful that the result should be different without regard to the manner in which the issue is framed, we prefer the more conventional framing of the issue which this opinion reflects.

who possess and transport peyote on a public street or road when their purpose for doing so is directly to facilitate the exercise of their good faith religious beliefs.

Our task is to confront issues not before the Supreme Court of California in People v. Woody, supra, viz. the scope of the unique sensitive prodedural rules, if any, which constitutionally must precede the arrest of a person in possession of peyote and a seizure of the peyote and other articles with respect to which a proper "nexus" exists. See Warden v. Hayden, 387 U.S. 294, 309, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1966)

As already indicated, the authority for the imposition of such unique rules is derived from the restrictions imposed by the Supreme Court of the United States on the seizure of obscene and allegedly obscene material. A Quantity of Books v. Kansas, supra; Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Scholars have also suggested that such rules be extended to other First Amendment areas. See, e. g., Monaghan, First Amendment "Due Process", 83 Harv.L.Rev. 518 (1970).

We believe, however, that the unique and sensitive procedures applicable to seizures of allegedly obscene material were

designed more for the special purpose of protecting a right of the public than to protect the rights of the person from whom the allegedly obscene material was seized. Seizure of allegedly obscene material prior to any determination of obscenity by means of an adversary hearing will result inescapably in the suppression of large numbers of nonobscene books. The public has a First Amendment right to the unimpeded flow of nonobscene books. The usual safeguards provided by our constitutionalized criminal procedure to an accused can not protect, in the obscenity area, this right of the public. Additional tools are necessary and these have been devised. Mr. Justice Brennan underscored this reason for such tools when he observed, "For if seizure of books precedes an adversary determination of their obscenity, there is a danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." A Quantity of Books v. Kansas, 387 U.S. 205, 213, 84 S.Ct. 1723, 1727, 12 L.Ed.2d 809 (1963).

In this case there is no corresponding right of the public that can not be protected by the usual rules relating to arrest and to search and seizure. The arrest of the

plaintiff in this case and the seizure of the peyote does not deprive other members of the Native American Chruch of the opportunity to practice their faith. There is no allegation is either cause of action before us that the peyote and religious paraphernalia seized from Golden Eagle are necessary to the practice by others of the faith they share with the plaintiff. Other supplies of such articles presumably exist in relative abundance. Any impairment of the free exercise of religion by others that exists flows from the "chilling effect" of the arrest of their fellow worshiper. The issue is whether the First Amendment requires an effort to reduce this "chilling effect" by utilizing any of the special procedures upon which the plaintiff insists.

We derive support for our holding that no such requiremnet exists from three sources. The first is Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288 (S.D.N.Y.1969), aff'd. 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), where a three judge district court refused to extend the pre-seizure adversary hearing requirement to arrests of those accused of promoting the sale of obscene material. It was recognized that such arrests have a "chilling effect", but the court

correctly observed that an adversary hearing itself would have a similar, or possibly greater, effect. Customary procedural safeguards available to an accused in a criminal proceeding, in the view of the court, were "surely permissible, and very probably preferred vehicles for enforcing bans against obscenity." 305 F.Supp. at 297. At least with respect to arrests for the possession of peyote, this reasoning is very pursuasive, if not conclusive. So long as an effort is made to enforce the laws of California relating to peyote, there is no way to avoid a "chilling effect" on those whose use of peyote is entitled to First Amendment protection by reasons of People v. Woody. Indeed, as Milky Way Productions, Inc. suggests, pre-arrest adversary hearings could be used so indiscriminately as to increase the barriers to the free exercise of religion by the members of the Native American Church beyond those which exists under present procedures. Given this possibility, surely it is permissible in this area to rely upon customary criminal procedure to provide the means by which constitutional claims are made.

Our second source of support is People v. Woody, supra. It nowhere indicates

that ordinary criminal procedures were to be altered in a questionable effort to reduce further the "chilling effect" of California laws relating to peyote. Nor is there to be found any suggestion that such laws should not be enforced in the interest of eliminating any trace of a chilling effect. In answering the Attorney General's argument that First Amendment protection of the religious use of peyote would involve the courts in a case by case inquiry into the good faith of the religious beliefs of the particular defendant, the court said:

> In so doing, we impose no undue burden upon the trier of fact. We do not doubt the capacity of judge and jury to distinguish between those who would feign faith in an esoteric religion and those who would honestly follow it. 40 Cal.Rptr. at 77, 394 P.2d at 821.

Certainly belief on the part of the Supreme Court of California that its decision would require the special procedures urged on us by the plaintiff should have been revealed, or at least intimated, at this point. It was not, and that court concluded the portion of its opinion in which the above quotation appears by observing that a factual determination of the bona fides of

a religious belief was not a unique judicial burden, it being required in other areas of the law, and did not "intrude into the religious issue at all." 40 Cal.Rptr. at 77, 394 P.2d at 821.

We can not escape the conclusion that the Supreme Court of California assumed that prosecutions for the possession and use of peyote would call for no special or particularly unique procedures. This assumption, of course, is not controlling in this case, but it is highly persuasive.

Its persuasiveness is enhanced by the third source of support for our holding, viz. the criminal procedure of California. The requirement of an expeditious hearing before a magistrate, West's Ann.Penal Code, §§822, 825, 849, without regard to whether the arrest was with or without a warrant, the opportunity to set aside an indictment or information, West's Ann.Penal Code, §995, and the procedure provided for securing the return of property improperly seized, West Ann.Penal Code, §1538.5, afford assurance that a determination of the good faith of a member of the Native American Church and a return of any sacred objects seized from him can be speedily resolved when the facts permit. These procedures

will not yeild in all instances a final disposition of the good faith issue. Only a trial on the merits will achieve this. Prior to that event an accused is likely to be released pending trial and thereafter may ensue offers to plead guilty to a lesser offense or, as in this case, a dismissal of charges.

The process that provides these opportunities for reconciling an accused's First Amendment rights regarding the religious use of peyote and the proper interests of law enforcement should not be further refined by requiring either an adversary hearing on the good faith issue prior to arrest or seizure of peyote and related religious articles, a special warrant procedure in which there would be an ex parte examination of the probable good faith of the person about to be arrested and searched, or an awkward requirement that officers must make a reasonable effort to confirm an assertion of good faith prior to formal arrest and seizure. With respect to this last alternative, it surely must be recognized that those charged with law enforcement can not be expected to be competent curbside evaluators of the good faith asserted religious beliefs or the

credibility of references supplied by the apprehended individual. To impose upon them duties of this sort, accompanied, as the plaintiff in oral argument suggested, by interim protective custody of the apprehended and impoundment of the peyote, is to impair seriously the ability to enforce the laws relating to the controlled substance, peyote, as applied to those who do not subscribe to the beliefs of the Native American Church. People v. Woody, supra, did not hold, nor suggest, that classifying peyote as a controlled substance was unconstitutional per se. An equivalent result should not be reached indirectly by the adoption of superfluous or unworkable procedures preceding arrest and seizure.

There remains only the charge that in all events the siezure of the box and Golden Eagle's personal religious articles violated the Fourth and Fourteenth Amendments. It is argued that the arresting officers could not have believed that such articles could aid in conviction. The officers, on the other hand, insist that there was a sufficient nexus between the box and religious articles and the peyote to meet the test laid down in Warden v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642,

18 L.Ed.2d 782 (1966). Although the issue is not entirely free from doubt, we hold that the arresting officers could reasonably believe that these articles would aid in the conviction of Golden Eagle. This being so, it matters not whether these articles are classified as fruits, instrumentalities, or contraband, or mere evidence that would aid in conviction.

The arrest and seizures before us in this case were not improper. The procedures which the plaintiff insists must precede arrest and seizure are not required by the First and Fourteenth Amendments. There existed probable cause for the arrest of Golden Eagle and probable cause to believe that the articles seized would aid in his conviction. In any event, defendants Peters, Heerd, Hall and Johnson acted in good faith and with probable cause in making the arrest and search under statutes that they believed to be valid. See Pierson v. Ray, 386 U.S. 547,555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1966).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GOLDEN EAGLE, also known as Lee Roy Austine,

Plaintiff,

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORNE and KIT NELSON,

Defendants.

No. F-469 Civ.

ORDER ON DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss was argued and submitted. Lee J. Sclar, Esq., appeared for plaintiff; Nelson P. Kempsky, Deputy Attorney General of the State of California, appeared for the California Highway Patrol; and Lowell T. Carruth, Esq., appeared for all other defendants.

Plaintiff's complaint alleges that the Highway Patrol stopped the car in which he

was a passenger because it lacked a light over the license plate. The driver was unable to provide satisfactory identification and the vehicle did not belong to anyone in it. When the officer asked plaintiff what was contained in the wooden box he answered "peyote".

These allegations do not state a claim on which relief can be granted as they establish that plaintiff's arrest was lawful.

Thus the first six causes of action are dismissed as to all defendants.

The Seventh Cause of Action alleges mistreatment during incarceration including kicking by a Deputy Sheriff and thus states a claim against Deputy Sheriffs Lenahan and Cooper.

The Equity Cause of Action is dismissed as to all defendants as plaintiff's remedy at law is adequate.

DATED: August 20, 1971.

M. D. Crocker
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GOLDEN EAGLE, also known as Lee Roy Austine,

Plaintiff,

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORNE and KIT NELSON,

Defendants.

CIVIL NO. F--469

ORDER FOR ENTRY OF FINAL JUDGMENT

Plaintiff's Motion for Entry of Final Judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure having duly come on for hearing on March 9, 1972, and having heard the argument of counsel appearing for the parties to this action, and considered the memoranda of points and authorities and other papers on file herein, and good cause appearing therefor,

IT IS ORDERED that a final judgment shall be entered in favor of all the defendants as to plaintiff's first six causes of aciton.

Dated: Mar. 16, 1972

M. D. Crocker
United States District Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-105

GOLDEN EAGLE, aka LEE ROY AUSTINE,
Petitioner,

vs.

DEPUTY SHERIFF JOHNSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS PETERS AND HEERD IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-105

GOLDEN EAGLE, aka LEE ROY AUSTINE
Petitioner

vs.

DEPUTY SHERIFF JOHNSON, et al
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS PETERS AND HEERD IN OPPOSITION

STATUTES INVOLVED

In addition to the provisions of law cited by petitioner, respondents Peters and Heerd have set forth pertinent statutes in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether respondents Peters and Heerd are subject to civil liability under the Civil Rights Act for their good faith enforcement of state law.

2. Whether petitioner is entitled to pre-arrest procedures in addition to those provided by state law.

3. Whether petitioner's use, possession and transportation of peyote are interests protected by federal law.

4. Whether the seizure of the personal religious articles was constitutional.

STATEMENT OF THE CASE

The opinion of the court below fairly and concisely summarized the factual allegations and procedural steps relevant to this proceeding. Responents Peters and Heerd rely entirely on the statement of the court below, which is reported at *Golden Eagle* v. *Johnson* (9th Cir. 1974) 493 F.2d 1179, 1180–1182.

ARGUMENT

I. Respondents Peters and Heerd Are Not Subject to Civil Liability Under the Civil Rights Act for Their Good Faith Enforcement of State Law

It is well established that good faith enforcement of state criminal statutes cannot lead to liability under the Civil Rights Act. *Pierson* v. *Ray* (1967) 386 U. S. 547.

> "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. (Citations omitted.) A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. . . . "

Id. at 555.

Petitioner does not claim that there was no probable cause for his arrest, as there obviously was. Officers Heerd and Peters legitimately stopped him for a California Vehicle Code violation, and when he told the officers of his possession of peyote and the other drugs, they clearly had probable cause to believe he had violated California Health and Safety Code sections 11540 (possession of peyote, superseded by § 11363 of the 1972 California Uniform Control Substances Act) and 11910 (possession of a restricted dangerous drug, superseded by § 11377). Whether petitioner had a valid religious defense to the first charge and a valid prescription for the other drugs were matters to be asserted at a later stage in his criminal proceedings.

Although it is alleged that the officers acted in bad faith, this allegation is conclusionary, without any indication of supporting facts, and inadequate to sustain a Civil Rights Act suit. *Roberts* v. *Barbosa* (S.D. Cal. 1964) 227 F.Supp. 20, 22; *Pugliano* v. *Staziak* (W.D. Pa. 1964) 231 F.Supp. 347, 349. Moreover, the motive of state officials is irrelevant if the action they take is authorized by law. *Negrich* v. *Hohn* (W.D. Pa. 1965) 246 F.Supp. 173, 177. The officers were clearly acting pursuant to law well established at the time of the arrest.

The petition for writ of certiorari makes it clear that petitioner is seeking a change in state law to provide him with protections which were not required by the law at the time petitioner was arrested. Under no analysis can the highway patrolmen who made the

initial arrest be expected to have acted other than they did. Because respondents Peters and Heerd are immune from liability for their good faith enforcement of the law as it existed on the night of July 11, 1970, petitioner has not stated a claim against them, and the complaint against them was properly dismissed by the district court. Likewise, the petition for writ of certiorari should be denied at least insofar as it seeks review of claims against respondents Peters and Heerd.

II. Whether Petitioner Is Entitled to Pre-Arrest Procedures in Addition to Those Provided by State Law Is Not an Important Question of Federal Law Requiring Resolution by This Court

The primary thrust of the petition for writ of certiorari is a request that this Court declare that petitioner is entitled to certain "sensitive" pre-arrest safeguards, other than those provided all arrestees by existing state law, in order to protect what he claims is his right to possess, use and transport peyote for religious purposes. Even assuming *arguendo* that petitioner has a right to possess, use and transport peyote, a proposition not accepted by federal courts, petitioner does not have a right to the pre-arrest procedures sought. First, the protection sought by petitioner is substantially provided by existing state law. Second, the procedures sought by petitioner are not constitutionally required and would not provide him with the relief he desires.

A. PETITIONER IS ADEQUATELY PROTECTED BY EXISTING STATE LAW

Petitioner urges this Court to mandate pre-arrest safeguards for persons found in possession of peyote claiming a religious defense. Specifically, he requests that an Indian in possession of peyote for religious purposes not be arrested without a warrant until a pre-arrest adversary hearing is conducted to determine whether his possession of the peyote is for bona fide religious purposes. In the alternative, he urges that no arrest occur until an *ex parte* hearing before a magistrate is conducted on the same question.[1] These contentions are greatly weakened by his concession that a police officer may take a suspect into custody until either the warrant hearing or the adversary hearing can be held.

What petitioner urges is substantially the same procedure followed in all criminal arrests in California.

A person arrested in California with or without a warrant must, "without unreasonable delay," be taken before a magistrate. A police officer who delays unreasonably is liable for false imprisonment. *Dragna* v. *White* (1955) 45 Cal.2d 469, 289 P.2d 428. It is unreasonable to delay taking a person arrested on Saturday afternoon before a magistrate until the following Tuesday morning; he should be brought before a magistrate on Monday morning. *United States* v. *Skeeters* (1954) 122 F.Supp. 52.

[1] In his petition, petitioner does not advance a third alternative urged by him in the court below, that the arresting officers conduct a roadside inquiry into the question of his good faith religious beliefs.

Within ten days of arraignment or plea, a defendant is entitled to a preliminary hearing to determine whether there is probable cause to hold the defendant for trial. California Penal Code section 859b. Should probable cause be found at this hearing, and the defendant bound over to superior court for trial, he may challenge the legality of any seizure of evidence (California Penal Code § 1538.5) and may set aside the indictment or information as not founded on probable cause (California Penal Code § 995).

Thus, within a short time after arrest (not later than ten days of arraignment, which must be prompt), all criminal defendants have the right to a pre-trial adversary hearing before a magistrate. Specifically, petitioner in the present case had the right to an inquiry into his religious defense very soon after his arrest.

Petitioner characterizes the hearing he seeks as "pre-arrest." Yet he would allow the police to "take the suspect into custody and impound the peyote until this determination can be made." (Petition page 13, footnote 4). How this taking into custody differs from an arrest is impossible to fathom. The difference between holding a suspect in custody until a "pre-arrest" hearing can be held and arresting a suspect followed by a prompt preliminary hearing is equally impossible to discern.

Because there is little or no difference between present California criminal procedure, and the system

proposed by petitioner, the petition for writ of certiorari does not raise an important question of federal law, and should be denied.

B. THE PROCEDURES SOUGHT BY PETITIONER ARE NOT CONSTITUTIONALLY REQUIRED

If petitioner is actually seeking a true pre-arrest adversary hearing (and not one held after the suspect is taken into custody), he can find no basis in the federal constitution to support his position.

At the time petitioner originally urged this position, he relied heavily on *Bethview Amusement Corp.* v. *Cahn* (2d Cir. 1969) 416 F.2d 410, which required an adversary hearing prior to a seizure of allegedly obscene movie films. He argued that this First Amendment protection should by analogy be extended to the circumstances of the present case.

Since that time, this Court has expressly disapproved *Bethview, supra,* and a similar case, *Astro Cinema Corp.* v. *Mackell* (2d Cir. 1970) 422 F.2d 293. In *Heller* v. *New York* (1973) 413 U.S. 483, 488, 493, this Court held that no pre-arrest adversary hearing was required by the First Amendment, and that indeed such a hearing would not materially increase First Amendment protection.

The reasoning of *Heller, supra,* is directly applicable in this case. A requirement of a pre-arrest adversary hearing would not materially reduce any chilling effect on the exercise of religious expression, as claimed by petitioner, but would at best merely advance any chilling effect to an earlier stage in the proceedings.

In *Milky Way Production, Inc.* v. *Leary* (S.D.N.Y. 1969) 305 F.Supp 288, 297, aff'd. 397 U.S. 98 (1970), a three-judge court was convened to consider, inter alia the issue:

> "It is inappropriate, we think, to 'weigh' (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the departure they urge are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity. (Citations omitted.)"

See also *United States v. Wild* (2d Cir. 1969) 422 F. 2d 34.

The reasoning of the court below is also persuasive on this issue. The opinion pointed out that the California Supreme Court, in holding that possession of peyote for religious purposes was protected in California, nowhere indicated that ordinary criminal procedures were to be altered in a questionable effort to reduce further the "chilling effect" of California laws relating to peyote. *Golden Eagle* v. *Johnson* (9th Cir. 1974) 493 F.2d 1179, 1185.

The procedures urged by petitioner find no support in law or reason. Petitioner has not raised an important question of federal law requiring resolution by

this Court, and the petition for writ of certiorari should be denied.

III. Petitioner's Use, Possession and Transportation of Peyote Are Not Interests Protected by Federal Law

If petitioner is entitled to some pre-arrest safeguards in addition to those already provided by state law, it becomes necessary to examine the underlying assumption that he has a right protected by the federal constitution to use, possess and transport on a public highway the drug peyote.

This proposition is not accepted by federal courts. As stated by the court below, citing *Kennedy* v. *Bureau of Narcotics and Dangerous Drugs* (9th Cir. 1972) 459 F.2d 415, neither this Court nor any other federal court has extended First Amendment protection to the religious use of peyote by the members of any church. *Golden Eagle* v. *Johnson, supra,* 493 F.2d 1179, 1183.

Petitioner cites *People* v. *Woody* (1964) 61 Cal.2d 716, 394 P.2d 813, for the proposition that the First Amendment protects the right of Indian communicants in the Native American Church to take peyote as a religious sacrament.

The leading federal case is *Leary* v. *United States* (5th Cir. 1967) 383 F.2d 851, 859–860, reh.den., 392 F.2d 220, reversed on other grounds, 395 U.S. 6. Defendant was convicted under various federal marijuana statutes. On appeal, the court refused to recognize his claimed religious belief as a defense.

". . . The testimony of appellant's witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marijuana for religious rituals by certain sects in India.

"Appellant's reliance on *Sherbert* v. *Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts."

Thus, the court expressly rejected the *Verner* rationale utilized by the California Supreme Court in *Woody, supra,* at pp. 723–724. But the court went even further than merely rejecting the rationale, saying: "We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned." *Leary, supra,* at p. 861.

A similar rationale was utilized in *United States* v. *Kuch* (D.C. 1968) 288 F.Supp 439. And in *United States* v. *Hudson,* (5th Cir. 1970) 431 F.2d 468, 469, the court held:

"Finally, it is argued that the district court should have permitted the jury to pass on appellants' assertions that they are sincere followers of the Moslem or Islamic religion, which sanctions the use of heroin and marijuana. Appellants claim that failure to admit this evidence violates their first

amendment right to freedom of religion. We disposed of this question in *Leary* v. *United States,* 5th Cir., 1967, 383 F.2d 851, 859–862, reversed on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed. 2d 57 (1969), where we cited numerous authorities in support of the proposition that the use of drugs as part of religious practice is not constitutionally privileged."

See also *State* v. *Bullard,* 267 N.C. 599, 148 S.E. 2d 565, cert. den. 385 U.S. 917 (1966), in which the defendant made contentions identical to those made by defendant in *Woody.* The court held that even assuming them to be sincere, that would not be a defense, for the First Amendment does not authorize acts contrary to the public safety, morals, peace and order committed in the course of free exercise of a religion.

Petitioner assumes that because Indians in California are protected in the sacramental use of peyote in their religious services that they are similarly protected in the use, transportation, or possession of peyote at any time. The assumption is faulty.

The California Supreme Court in *People* v. *Woody, supra,* 61 Cal.2d 716, upheld the limited right of members of the Native American Church to possess and use peyote where the peyote was possessed only for use in the bona fide religious ceremonies of that church, in accordance with the long established method of worship followed by the church and its members, under which peyote was an essential element of the defendants' religious faith and practice. In *Woody,* defendants were arrested during performance of their

religious ceremonies in a hogan near Needles, California, and the court observed, "The state agrees, and the evidence amply demonstrates, that defendants' use of peyote was for a religious purpose." *Woody* at p. 727.

Arrests made during performance of bona fide religious services are a far cry from an arrest of an individual on a public highway who possesses the contraband in a vehicle. Petitioner makes no allegation that the peyote seized was possessed or being transported for use in a religious ceremony.

The extension of the doctrine of *Woody* urged by petitioner would effectively negate the state's power to regulate the use, transportation and possession of peyote. An abuser of the drug would merely have to place his contraband in some type of container with real or pseudo religious markings in order to take it out of the realm of contraband and into the realm of religion.

It is submitted that the conduct engaged in by appellant is not protected by the *Woody* decision, and that even should this Court decide to protect members of the Native American Church in their religious use of peyote, similar protection should not be extended to mere possession or transportation on a public highway.

IV. The Seizure of the Personal Religious Articles Was Constitution, and Need Not Be Reviewed By This Court

By citing *Warden* v. *Hayden* (1967) 387 U.S. 294, petitioner appears to contend that the box containing the peyote and other items was of mere evidentiary value, and should not have been seized. However,

Hayden stands for the opposite proposition, for it is the case in which this Court abandoned the distinction between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband.

Petitioner further asserts that the officers could have had no cause to believe that the evidence seized would aid in conviction. That the container of the contraband drugs has a bearing on appellant's guilt cannot be disputed. The officers were justified in seizing this important evidence, which was so closely connected with the contraband as practically to be identified with it. The allegedly religious markings and character of the other items in the box could be used by appellant to establish his religious defense, had the case gone to trial. On the other hand, the prosecution could have used the evidence to establish that appellant's beliefs were not bona fide should expert testimony be able to establish that the markings were of no significance in appellant's religion. In any case, the officers clearly had probable cause to believe that the items would be of evidentiary value.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari be denied.

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APPENDIX

California Health and Safety Code

Section 11363.

(a) Every person who plants, cultivates, harvests, dries, or processes any plant of the genus Lophophora, also known as peyote, or any part thereof shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not more than 10 years.

(b) If such person has been previously convicted of any offense described in subdivision (c), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years.

(c) Any previous conviction of any of the following offenses, or of an offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such an offense, shall be charged pursuant to subdivision (b) of this section:

(1) Any offense described in Section 11378, 11379, or 11380.

(2) Any offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section

11054, or specified in subdivision (b) or (c) of Section 11055.

(3) Any offense described in this division involving a narcotic drug classified in Schedule III, IV, or V.

Section 11377.

(a) Except as otherwise provided in Article 8 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, other than any substance specified in paragraph (6) of subdivision (b) of Section 11056, and which is not a narcotic drug or (2) which is specified in subdivision (d) of Section 11054, except paragraphs (10), (11), (12), and (17) of such subdivision or specified in subdivision (d) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year nor more than 10 years.

(b) Except as otherwise provided in Article 8 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance specified in paragraph (6) of subdivision (b) of Section 11056, unless upon the prescription of a physician, dentist, podiatrist or veterinarian licensed to practice in this state, shall be punished by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

(c) If a person charged with an alleged violation of subdivision (a) has been previously convicted once of any offense described in subdivision (d), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

(d) Any previous conviction of any felony offense described in this article, of a conspiracy to commit any offense described in this article, or of any offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such a felony offense, shall be charged pursuant to subdivision (c).

California Penal Code

Section 821.

If the offense charged is a felony, and the arrest occurs in the county in which the warrant was issued, the officer making the arrest must take the defendant before the magistrate who issued the warrant or some other magistrate of the same county.

If the defendant is arrested in another county, the officer must, without unnecessary delay, inform the defendant in writing of his right to be taken before a magistrate in that county, note on the warrant that he has so informed defendant, and, upon being required by defendant, take him before a magistrate in that county, who must admit him to bail in the amount specified in the endorsement referred to in Section

815a, and direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than 10 days after such admittance to bail. If bail be forthwith given, the magistrate shall take the same and endorse thereon a memorandum of the aforesaid order for the appearance of the defendant, or, if the defendant so requires, he may be released on bail set on the warrant by the issuing court, as provided in Section 1269b of this code, without an appearance before a magistrate.

If the warrant on which the defendant is arrested in another county does not have bail set thereon, or if the defendant arrested in another county does not require the arresting officer to take him before a magistrate in that county for the purpose of being admitted to bail, or if such defendant, after being admitted to bail, does not forthwith give bail, the arresting officer shall immediately notify the law enforcement agency requesting the arrest in the county in which the warrant was issued that such defendant is in custody, and thereafter such law enforcement agency shall take custody of such defendant within five days in the county in which he was arrested and shall take such defendant before the magistrate who issued the warrant, or before some other magistrate of the same county.

Section 822.

If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, without unnecessary delay, inform the defendant in writing of his right to be taken before a magistrate in that county, note on the warrant that he has so informed defendant, and, upon being required by defend[illegible]ke him before a magistrate in that county,

who must admit him to bail in the amount specified in the indorsement referred to in Section 815a, or if no bail is specified, the magistrate may set bail: if the defendant is admitted to bail the magistrate shall direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than 10 days after such admittance to bail. If bail be forthwith given, the magistrate shall take the same and indorse thereon a memorandum of the aforesaid order for the appearance of the defendant.

If the defendant arrested in another county on a misdemeanor charge does not require the arresting officer to take him before a magistrate in that county for the purpose of being admitted to bail, or if such defendant, after being admitted to bail, does not forthwith give bail, the arresting officer shall immediately notify the law enforcement agency requesting the arrest in the county in which the warrant was issued that such defendant is in custody, and thereafter such law enforcement agency shall take custody of such defendant within five days in the county in which he was arrested and shall take such defendant before the magistrate who issued the warrant, or before some other magistrate of the same county.

If a defendant is arrested in another county on a warrant charging the commission of a misdemeanor, upon which warrant the amount of bail is indorsed as provided in Section 815a, and defendant is held in jail in the county of arrest pending appearance before a magistrate, the officer in charge of the jail shall, to the same extent as provided by Section 1269b, have authority to approve and accept bail from defendant in the amount indorsed on the warrant, to issue and sign

an order for the release of the defendant, and, on posting of such bail, shall discharge defendant from custody.

Section 823.

On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant to the officer having charge of the defendant. The magistrate shall issue to defendant a receipt for the undertaking of bail. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant to the clerk of the court at which the defendant is required to appear. If the undertaking of bail is in the form of a bond, the magistrate shall forward the bond to the court at which defendant is required to appear. If the undertaking is in the form of cash, the magistrate shall deposit the cash in the county treasury, notifying the county auditor thereof, and the county auditor shall, by warrant, transmit the amount of the undertaking to the court at which the defendant is required to appear. If authorized by the county auditor, the magistrate may deposit the money in a bank account pursuant to Section 68084 of the Government Code, and by check drawn on such bank account transmit the amount of the undertaking to the court at which the defendant is required to appear.

Section 825.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when

the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

Section 849.

(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person was arrested only for being under the influence of a narcotic, drug, or restricted dangerous drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable.

(c) Any record of arrest of a person released pursuant to paragraphs (1) and (3) of subdivision (b) shall include a record of release. Thereafter, such arrest shall not be deemed an arrest, but a detention only.

Section 859.

When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him that he has the right to have the assistance of counsel, ask him if he desires the assistance of counsel, and allow him reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that he must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned for him, and allow him a reasonable time to send for his chosen or assigned counsel. The magistrate must, upon the request of

the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor.

Section 859a.

If the public offense charged is a felony not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein and to a previous conviction or convictions of crime if charged; thereupon, or at any time thereafter, while the charge remains pending before the magistrate and when his counsel is present, the defendant may plead guilty to the offense charged, or, with the consent of the magistrate and the district attorney or other counsel for the people, plead nolo contendere to the offense charged or plead guilty or nolo contendere to any other offense the commission of which is necessarily included in that with which he is charged, or to

an attempt to commit the offense charged and to the previous conviction or convictions of crime if charged; and upon such plea of guilty or nolo contendere, the magistrate may then fix a reasonable bail as provided by this code, and upon failure to deposit such bail or surety, shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court. The foregoing provisions of this section shall not be construed to authorize the receiving of a plea of guilty or nolo contendere from any defendant not represented by counsel. If the defendant subsequently files a written motion to withdraw the plea under Section 1018, the motion shall be heard and determined by the court before which the plea was entered.

Section 859b.

At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense. Unless the defendant waives the right, the defendant if he is in custody shall

have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.

Section 995.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

Section 1538.5.

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are

utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on

the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to

show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Sec-

tion 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(1) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall

be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be

initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1974

No. 74-105

GOLDEN EAGLE, also known at Lee Roy Austine,
Petitioner,

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORN and KIT NELSON,
Respondents.

RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Other than the statutes and constitutional provisions set forth in the petition, respondents direct the court's attention to the following provisions:

1. Cal. Const. Art. I, §4 (West 1954):

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

2. Cal. Pen. Code §825 (West 1970):

The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of

a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

3. Cal. Pen. Code §859b (West Supp. 1974):

At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense. *Unless the defendant waives the right, the defendant if he is in custody shall have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.*

4. Cal. Health and Safety Code §11032 (West Supp. 1974):

Whenever reference is made to the term "narcotics" in any provision of law outside of this division, unless otherwise expressly provided, it shall be construed to mean controlled substances classified in Schedules I and II, as defined in

this division. Whenever reference is made to "restricted dangerous drugs" outside of this division, unless otherwise expressly provided, it shall be construed to mean controlled substances classified in Schedules III and IV. Whenever reference is made to the term "marijuana" in any provision of law outside of this division, unless otherwise expressly provided, it shall be construed to mean marijuana as defined in this division.

5. Cal. Health and Safety Code §11054 (West Supp. 1974):

(a) The controlled substances listed in this section are included in Schedule I.

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acethlmethadol.

(2) Allyprodine.

(3) Alphacetylmethadol.

(4) Alphameprodine.

(5) Alphamethadol.

(6) Benzethidine.

(7) Betacetylmethadol.

(8) Betameprodine.

(9) Betamethodol.

(10) Betaprodine.

(11) Clonitazene.

(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.

(40) Properidine.

(41) Propiran.

(42) Racemoramide.

(43) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.

(2) Acetyldihydrocodeine.

(3) Benzylmorphine.

(4) Codeine methylbromide.

(5) Codeine-N-oxide.

(6) Cyprenorphine.

(7) Desomorphine.

(8) Dihydromorphine.

(9) Etorphine.

(10) Heroin.

(11) Hydromorphinol.

(12) Methyldesorphine.

(13) Methyldihydromorphine.

(14) Morphine methylbromide.

(15) Morphine methylsulfonate.

(16) Morphine-N-oxide.

(17) Myrophine.

(18) Nicocodeine.

(19) Nicomorphine.

(20) Normorphine.

(21) Phoclodine.

(22) Thebacon.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine.

(2) 5-methoxy-3,4-methylenedioxy amphetamine.

(3) 3,4,5-trimethoxy amphetamine.

(4) Bufotenine.

(5) Diethyltryptamine.

(6) Dimethyltryptamine.

(7) 4-methyl-2,5-dimethoxylamphetamine.

(8) Ibogaine.

(9) Lysergic acid diethylamide.

(10) Marijuana.

(11) Mescaline.

(12) Peyote.

(13) N-ethyl-3-piperidyl benzilate.

(14) N-methyl-3-piperidyl benzilate.

(15) Psilocybin.

(16) Psilocyn.

(17) Tetrahydrocannabinols.

QUESTIONS PRESENTED

I. Does the freedom of religion encompass the right to use non-prescription narcotics, the possession of which is declared to be a crime under state law?

II. Assuming the freedom of religion encompasses the right to use narcotics, does that right require the implementation of certain procedural safeguards and if so, does California law satisfy that requirement?

III. Is the seizure of evidentiary items incident to arrest valid if such articles are relevant to establish the arrestee's commission of a crime?[1]

ARGUMENT

I. DOES THE FREEDOM OF RELIGION ENCOMPASS THE RIGHT TO USE NON-PRESCRIPTION NARCOTICS, THE POSSESSION OF WHICH IS DECLARED TO BE A CRIME UNDER STATE LAW?

The freedom of religion is one of the most cherished freedoms in any libertarian society such as ours. Nevertheless, that freedom is not absolute. See *American Communications Asso. v. Douds,* 339 U.S. 382, 398, 94 L.Ed. 925, 943, 70 S.Ct. 674, 683-684 (1949). Nearly a century ago in *Reynolds v. United States,* 98 U.S. 145, 32 L.Ed. 28 (1879) this court held that the practice of polygamy pursuant to good faith religious beliefs was nevertheless punishable as a crime as it had been at common law. In so holding, the court observed:

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[1]Pursuant to the provisions of Rules 24 and 40 of the Supreme Court Rules, the jurisdictional statement and the statement of the case have been omitted for purposes of brevity.

> "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist in name only under such circumstances." *Reynolds v. United States, supra,* 98 U.S. at 166-167, 21 L.Ed. at 250.

Again, in *Davis v. Beason,* 133 U.S. 333, 33 L.Ed. 637, 10 S.Ct. 299 (1889) the court reaffirmed the principles established under *Reynolds* and went on to state:

> "It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced in this country, therefore, any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. Whilst legislation for the establishment of

> religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion." *Davis v. Beason, supra,* 133 U.S. at 345 33 L.Ed. at 641.

The rule of law enunciated by the court in the *Reynolds* and *Davis* cases—that Congress and the states have no power over religious beliefs but are completely free to regulate practices—has been extensively eroded by the court over the years and has recently come into disfavor. See *Wisconsin v. Yoder,* 406 U.S. 205, 219-220, 22 L.Ed.2d 15, 27-28, 92 S.Ct. 1526, 1535-1536 (1972). The underlying theme of *Reynolds* and *Davis,* however, that the states' interest in promoting the "health, safety and general welfare" of the people, is still prevalent. *Wisconsin v. Yoder, supra.*

The recent decisions of this court indicate that the government's interest in promulgating the regulation in question must be weighed against the claim of religious freedom. When the government's interest in regulating certain conduct is considered minimal, that interest will not overcome a bona fide claim of religious practice. *Wisconsin v. Yoder, supra; Murdock v. Pennsylvania,* 319 U.S. 105, 87 L.Ed. 1292, 63 S.Ct. 870 (1943); *Cantwell v. Connecticut,* 310 U.S. 296, 303-304, 84 L.Ed. 1213, 1217-1218, 60 S.Ct. 900 (1940). Where, however, the governmental interest in proscribing certain conduct is legitimately strong and of sufficient importance, is deemed to be overriding, the claim of religious freedom notwithstanding. See

Gillette v. United States, 401 U.S. 437, 28 L.Ed.2d 168, 91 S.Ct. 828 (1971); *Braunfeld v. Brown,* 366 U.S. 599, 6 L.Ed.2d 563, 81 S.Ct. 1144 (1961); *Prince v. Massachusetts,* 321 U.S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1944).

Accordingly, the underlying theme of *Reynolds* and *Davis*—that the government's interest in protecting its citizens is essential to the maintenance of good government—has been repeatedly reaffirmed by the court in a variety of contexts. See e.g. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961); *Fowler v. Rhode Island,* 345 U.S. 67, 97 L.Ed. 828, 73 S.Ct. 526 (1952); *American Communications Asso. v. Douds,* 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1949); *United States v. Ballard,* 322 U.S. 78, 88 L.Ed. 1148, 64 S.Ct. 882 (1943); *Murdock v. Pennsylvania,* 319 U.S. 105, 87 L.Ed. 1292, 63 S.Ct. 870 (1943).

As Mr. Justice Rutledge so aptly observed in his dissent in *Everson v. Board of Education,* 330 U.S. 1, 32, 91 L.Ed. 711, 732, 67 S.Ct. 504, 519 (1946):

> "It [the First Amendment] secures all forms of religious expression, credal, sectarian, or non-sectarian, whenever and however taking place, except conduct which trenches upon the like freedom of others or clearly and presently endangers the community's good order and security."

Petitioner's implicit claim, that the use of peyote for religious purposes, or for any purpose, does not significantly infringe upon the legitimate interest of California in proscribing the use of non-prescription narcotics is not well founded. Indeed, petitioner's complaint does not even allege that peyote is not a

harmful substance when ingested, but only makes the bare assertion that peyote is "non-addictive." (T.R. 5)

In view of the presently alarming increase in the rate of violent crimes and its admitted connection to the increase in illicit drug use, California's interest in proscribing possession of such substances cannot be said to be minimal. Rather, the state has an overriding interest in protecting its inhabitants from violent or otherwise offensive acts committed by persons who are either under the influence of narcotics or from persons seeking to rob or burglarize in order to purchase such drugs. Moreover, the state's interest in preventing its subjects from engaging in a self-destructive course of conduct through the use of admittedly harmful non-prescription narcotics is equally overriding.[2]

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[2]At this point, these respondents wish to point out why they feel the California Supreme Court's decision in *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P. 2d 813 (1964) is erroneous.

First, the court in that case appeared to place considerable reliance on the importance of peyote to the Native American Church, stating "it [peyote] is the sole means by which defendants are able to experience their religion." 61 Cal. 2d at 725. By delving so deeply into the tenets of the particular faith, however, the court violated the universal rule that Courts must not become involved in religious questions. Upon being confronted with a claim of religious freedom and deciding that such belief is held in good faith, the judicial inquiry should end with the presumption that the exercise of the religious practice is essential to the practice of the faith. For a court is not qualified to measure the values of any particular religion or even to determine whether that religion has any values at all.

Secondly, in weighing the competing interest of the state and the members of the church, the court stated "the use of peyote presents only slight dangers to the state." 61 Cal. 2d at 727. Although this comment discloses that the court made somewhat of a legislative type decision, that observation can no longer be given much weight. The *Woody* case was decided in 1964, before the heavy onslaught of dangerous drug use in this country occurring in the late 1960s, and before the resultant crime wave which we are currently experiencing.

Thirdly, the court in *Woody* seemed to confine its consideration to the particular drug in question: peyote; as does petitioner in

Indeed this court recently acknowledged the significance of the state's interest in proscribing such activities as prostitution, suicide, voluntary self-mutilation, brutalizing "bare fist" prize fights, duels, bigamy, adultry, fornication, "white slavery", billiard halls, gambling, and the like. *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 68, 37 L.Ed.2d 446, 463-464, 93 S.Ct. 2628, 2641, fn. 15 (1973).

These respondents thus submit that California's interest in proscribing the possession of non-prescription narcotics overrides petitioner's claim of religious freedom. The claim of constitutional protection, it is submitted, cannot be validated by this court if our society is to remain one of "ordered liberty." Remembering the words of the court in *Davis v. Beason, supra,* "Crime is not the less odious because sanctioned by what any particular sect may designate as religion."[3]

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the present case. Such an analysis, it is submitted, is not well founded because (1) the breadth of that holding would apply to all drugs as well as other self-destructive practices condemned in *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 68, 37 L. Ed. 2d 446, 463-464, 93 S. Ct. 2626, 2641, fn. 15, particularly in view of the fact that the California Legislature has classified peyote as a narcotic along with numerous other substances of like content. Cal. Health & Safety Code §§11032, 11054 (West Supp. 1974); and (2) in view of many of the recent studies undertaken by private groups as well as the government, it cannot be said that the use of one drug does not lead to the use of others which are equally self-destructive.

Additionally, it is to be noted that *People v. Woody, supra,* rested on the religious freedom encompassed within Cal. Const. Art. I, §4 as well as the First Amendment to the Constitution. *People v Woody, supra,* 61 Cal. 2d at 718 fn. 1. Accordingly, that decision was not reviewable by this court although it admittedly purported to be an authoritative interpretation of the First Amendment as well.

[3]As an alternative to the above argument, these respondents respectfully direct the court's attention to the fact that petitioner's arrest occurred while he was transporting the subject peyote from the Navajo Indian Reservation to his home in Los Altos, California,

II. ASSUMING THE FREEDOM OF RELIGION ENCOMPASSES THE RIGHT TO USE NARCOTICS, DOES THAT RIGHT REQUIRE THE IMPLEMENTATION OF CERTAIN PROCEDURAL SAFEGUARDS AND IF SO, DOES CALIFORNIA LAW SATISFY THAT REQUIREMENT?

Conceding for purposes of argument that petitioner's use and possession of peyote is protected by the freedom of religion encompassed within the First Amendment, petitioner's complaint nevertheless fails to establish a cause of action under the Civil Rights Act.

When a police officer makes an arrest in good faith and with probable cause to believe that a crime has been or is being committed, he is immune from liability under the Civil Rights Act. *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). Petitioner does not contend that his knowing possession of the peyote did not establish a prima facie case under California law. See *People v. Williams,* 5 Cal.3d 211, 215, 95 Cal.Rptr. 530, 485 P.2d 1146 (1971). Rather, petitioner's only dispute with the validity of the arrest is his contention that his possession of the peyote was protected by the First Amendment. Assuming the validity of this position, however, it neverthe-

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a journey of considerable distance. (T.R. 5-6) In other words, petitioner was not using the peyote for religious purposes during the time period with which this action is concerned, and his activities were not even alleged to be connected with his use of the peyote for religious purposes. On the basis of such facts, it is submitted that whatever privilege might surround petitioner's actual use of the peyote for religious purposes in private, e.g., *Stanley v. Georgia,* 394 U.S. 557, 22 L. Ed. 2d 542, 87 S. Ct. 1243 (1969), such privilege has no application to the transportation of illicit drugs on public thoroughfares. *United States v. 12 200-ft. Reels,* 413 U.S. 123, 37 L. Ed. 2d 500, 93 S. Ct. 2655 (1973); *United States v. Orito,* 413 U.S. 139, 37 L. Ed. 2d 513, 93 S. Ct. 2674 (1973).

less appears that the religious purposes for which the peyote was possessed is a defense to the crime charged under California law rather than an element of the prosecution's case, and thus the burden of proving that defense is on the accused. *In re Grady,* 61 Cal.2d 887, 39 Cal.Rptr. 912, 394 P.2d 728 (1964). Accordingly, in view of the fact that petitioner's on-the-scene admission, coupled with the seizure of the peyote established all the necessary elements of the crime charged under California law, probable cause to arrest petitioner clearly existed and these respondents are immune from liability regardless of the subsequent outcome of the criminal proceedings. *Pierson v. Ray, supra.* As the Circuit Court of Appeals so aptly observed, ". . . it surely must be recognized that those charged with law enforcement cannot expect to be curbside evaluators of the good faith of asserted religious beliefs . . ." *Golden Eagle v. Johnson,* 493 F.2d 1179 (9th Cir., 1974).

This observation alone adequately distinguishes *A Quantity of Books v. Kansas,* 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964) and other cases relied on by petitioner. In those cases, a prior adversary hearing to determine the question of obscenity was deemed compelled by the First Amendment. The fact that the materials were obscene, however, was an element of the crime or the cause of action for seizure and confiscation and, therefore, must be established by the government. In the case of possessing peyote for religious purposes, however, the statutes proscribing their possession are admittedly valid on their face and at best are only unconstitutional when applied to an accused who establishes that his possession was strictly for religious purposes. See *People v. Woody,* 61

Cal.2d 716, 717-718, 41 Cal.Rptr. 69, 394 P.2d 813 (1964).[4]

Petitioner's contention that the state should be required to implement further "procedural safeguards" allowing for a speedy resolution of the religious freedom question is thus unsound.

Though petitioner frames his argument in terms of "pre-arrest" safeguards, that characterization is misleading. As noted in the opinion of the Circuit Court of Appeals, even petitioner concedes that the accused must be taken into "protective custody" pending the outcome of the "pre-arrest" hearing which petitioner advocates. *Golden Eagle v. Johnson, supra,* 493 F.2d at 1182. Such custody of an accused, for whatever reason, is obviously an arrest. *United States v. Robinson,* 414 U.S. 218, ... 38 L.Ed.2d 427, 440, 94 S.Ct. 467, 476 (1973).[5] Apparently then, the only disagreement between petitioner and these respondents is the amount of time which an accused must suffer incarceration.

Under California law, an individual who is arrested must be arraigned before a magistrate within two days after his arrest. Cal. Pen. Code §825 (West 1970). Within 10 court days thereafter, an accused

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[4]Furthermore, *A Quantity of Books v. Kansas, supra,* is also distinguishable, as the Circuit Court of Appeals noted, on the grounds that that case involved, in addition to the owners First Amendment Rights, the further right of the public to receive information and ideas. No such right is present in the instant case.

[5]It is also noted that any distinction implicit in petitioner's argument between an "arrest" and "custody" is meritless since both involve identical restrictions on the individual's freedom of movement and permit the incarcerating authorities to exercise control over his person and possessions. *U.S. v. Robinson, supra.*

who is in custody is entitled to a preliminary hearing. Cal. Pen. Code §859b (West Supp. 1974). At the preliminary hearing, the accused is afforded all his due process rights, is permitted to raise his defense, and is entitled to be discharged if he successfully does so. *Jennings v. Superior Court,* 66 Cal.2d 867, 59 Cal. Rptr. 440, 428 P.2d 304 (1967).

Such procedures, it is submitted, constitute an adequate vehicle through which an accused such as petitioner can raise his defense of possessing narcotics for religious purposes.

Indeed petitioner does not even specify a maximum time within which an accused raising such a defense should be "in protective custody" pending the "adversary hearing" proposed. Whatever length of time petitioner might possibly propose, however, it would appear that the difference in the time element between that which might be proposed and those which already exist is minimal and thus any changes should be left to the discretion of the appropriate legislative body.[6]

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[6]At this juncture, it is also pertinent to note that to establish further procedural safeguards for accused persons claiming religious defenses above and beyond that which other accused individuals are entitled to would come dangerously close to and might even constitute an "establishment of religion" prohibited by the First Amendment.

III. IS THE SEIZURE OF EVIDENTIARY ITEMS INCIDENT TO ARREST VALID IF SUCH ARTICLES ARE RELEVANT TO ESTABLISH THE ARRESTEE'S COMMISSION OF A CRIME?

Petitioner's further contention that the seizure of religious articles contained in the box where the peyote was found was invalid is meritless.

Under California law, the elements of the crime of possessing narcotics are "physical or constructive possession thereof coupled with knowledge of the presence and narcotic character of the drug." *People v. Williams,* 5 Cal.3d 211, 215, 95 Cal.Rptr. 530, 485 P.2d 1146 (1971). The religious paraphernalia was relevant to establish that petitioner had knowledge of the presence of the peyote (since those items belonged to him and were located near the peyote) and that petitioner had knowledge of the narcotic character of the peyote (since the articles tended to establish the purpose for which the peyote was used, and thus by implication, that petitioner was aware of that purpose). Accordingly, a sufficient "nexus" between the seized articles and the crime for which petitioner was arrested was present since those items would aid the prosecution in establishing the elements of the crime. *Warden v. Hayden,* 387 U.S. 294, 306-307, 18 L.Ed.2d 782, 791-792, 87 S.Ct. 1643, 1649-1650 (1967).

CONCLUSION

On the basis of the foregoing, it is submitted that the use of non-prescription narcotics declared to be illegal by state law is not and cannot be protected

under the free exercise clause of the First Amendment. Such conduct is dangerous to society and to the individual, and the state's interest in proscribing its use overrides the competing claim of religious freedom.

Furthermore, these respondents are immune from liability for making an arrest with probable cause, even if petitioner's claim of religious freedom is a valid defense. Such a defense can only be tendered in the orderly course of criminal proceedings which provide a speedy and adequate remedy for an accused seeking to raise this defense.

For the above reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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